MANOKARAN MUNUSAMY

v.

PUBLIC PROSECUTOR & ANOTHER CASE

HIGH COURT MALAYA, PENANG
ABDUL HAMID OMAR J
[CRIMINAL APPEAL NO. 33 & 16 OF 1981]
17 MARCH 1982

CRIMINAL PROCEDURE: *Criminal intimidation - Attempted to put in fear of death - Abetment of criminal intimidation.*

CRIMINAL PROCEDURE: *Trial - within a trial accused prevented from calling witnesses to prove innocence - Whether miscarriage of justice - Cautioned statement - Whether duty of court to determine it was made voluntarily - Credibility of witness - Whether the question of fact.*

These are two appeals in this case, first by the appellant Manokaran s/o Munusamy against the decision of the Magistrate, Penang whereby he was convicted and sentenced to 3 years' imprisonment on each charge to run concurrently, one for criminal intimidation and other relating to extortion punishable under ss. 506 and 387 respectively of the Penal Code. The second appeal is by the Public Prosecutor against the acquittal of Janiki d/o Vadivelu by the same Magistrate on the charge of abetment of the criminal intimidation punishable under ss. 109 and 506 of the Penal Code.

The appellant and the respondent were both employed by Madam Lim Soh Bee, the wife of Datuk Gunn Chit Tuan, High Court Judge, Penang as a driver and domestic servant respectively. On the evening of 22 May 1978 when Madam Lim and her husband returned home the appellant told them that two men came on a motor cycle and inquired of them and wanted to see the Judge and would return.

On 23 May 1978 at 10.30 a.m. while Madam Lim was in the house she received a telephone call asking for her husband in Malay, when she asked why the caller was asking for her husband, he mumbled something and she heard he said 'tembak'. She refused to converse and put down the phone. She was worried as she suspected the call was from the persons who had come the day before as informed by the appellant. It is also in evidence that when Madam Lim and her husband returned home on the evening of 23 May 1978 the appellant told them that he received a phone call in their absence and the caller asked for the Judge. On 24 May 1978 the appellant again told them that while they were out in the evening, another phone call came and this time, the caller spoke in English and asked him to tell his boss to take RM10,000 to a hotel near Rasa Sayang and not to tell the police. All these calls were received in the absence of both Madam Lim and her husband.

It is the prosecution case that the whole thing was planned by the appellant to intimidate and threaten Madam Lim and her husband the Judge and had put them in fear of death in the attempt to extort money. The prosecution was relying to an extent on circumstantial evidence but primarily on the cautioned statement recorded from the appellant admitted in evidence by the Magistrate.

These are two main grounds of appeal namely:

(a) that there has been a miscarriage of justice in that the appellant was prevented from calling witnesses to prove his innocence during the trial within a trial and

(b) that the learned Magistrate erred in law in admitting the cautioned statement made by the appellant.

The other grounds raised by the appellant are that:

(i) the learned Magistrate failed to direct his mind to the several contradictions and material discrepancies in the prosecution case;

(ii) the learned Magistrate ought to have held that PW2 the investigating officer was a dishonest witness and a perjurer who just wanted to close the file because of personalities involved;

(iii) the learned Magistrate failed to scrutinise the evidence of witnesses and misdirected himself by not drawing his attention to the salient points in the evidence of both sides;

(iv) the learned Magistrate did not consider the defence properly and adequately and

(v) the learned Magistrate in his grounds of judgment misdirected himself in that he failed to direct himself properly or adequately upon the burden and standard of proof.

The Public Prosecutor's sole ground of appeal was that: the learned Magistrate erred in both law and fact to which he admitted in the grounds of judgment, in failing to consider the totality of the prosecution's case in acquitting and discharging the respondent without calling her to the defence

Held:

[1] The learned Magistrate has given adequate consideration to the overall aspects of the evidence before arriving at a finding of fact and for this reason the appellate Court should be slow to interfere with such finding.

[2] Although there was no specific reference made by the learned Magistrate to the contradictions or discrepancies in the evidence, but on careful analysis of the evidence there is no material or serious contradictions or discrepancies. The learned Magistrate did direct his mind to the totality of the evidence at the close of the prosecution case to decide whether there was a *prima facie* case made out against the appellant for the defence to be called.

[3] It is settled law that the credit to be attached to a particular witness is primarily one of fact and it is for the Magistrate who sees and hears a witness to assess the credibility of the testimony and it is not for the appellate Court to say whether a witness ought or ought not to have been held as dishonest unless it appears clear on the face of the record that a witness has seriously contradicted himself and in material particulars that no value should be attached to his testimony.

[4] Although there is some irregularity in the trial within a trial where the Magistrate was not quite sure of the procedure to be adopted, the learned Magistrate did finally direct his mind to the evidence of and submissions by both sides before he proceeded to make a final finding of fact based on the materials before him that the cautioned statement was voluntarily made by the appellant. Such a finding is not manifestly against the weight of evidence to warrant a reversal of such finding. The irregularity in the proceedings is not that it is incurable under s. 422 of the CPC and is not such that it has occasioned a failure of justice.

[5] The learned Magistrate did direct his mind quite sufficiently, to the defence evidence and had not erred in law or fact in arriving at the finding based upon the considerations he gave to the defence evidence adduced before him.

[6] The evidence of the prosecution viewed together with the cautioned statement discloses that at the close of the prosecution case, in so far as the appellant was concerned, the prosecution had proved the ingredients; it had to prove to make out a case under s. 506 and s. 387 of the Penal Code to warrant the defence to be called.

[7] The appeal is dismissed and conviction confirmed.

[8] The sentence is reduced to 18 months' imprisonment on each charge to run concurrently with effect from the date of judgment as appellant is a first offender and he has for reasons not entirely of his own making been and out of Court during the last 4 years and all this while the charge has been hanging over his head.

[Appeal by accused.]

[1] What the learned Magistrate had to consider at the close of the prosecution case in respect of the respondent was essentially a question of fact and in this regard the Magistrate quite rightly rejected the cautioned statement.

[2] The learned Magistrate quite rightly acquitted and discharged the respondent as even if the totality of her evidence has to be viewed at the close of the prosecution case such a finding by the learned Magistrate would not have been against the weight of evidence. The DPP has not shown sufficient merit to justify a reversal of the order of acquittal.

[3] The Public Prosecutor's appeal against the respondent's acquittal is dismissed.

[Appellant's appeal against conviction dismissed. Sentence reduced to 18 months on each charge to run concurrently. DPP's appeal against acquittal of respondent dismissed.]

Case referred to:
PP v. Ng Goh Weng & Anor. [1979] 1 MLJ 127

Legislation referred to:
Penal Code, ss. 109, 387, 422, 506

For the appellant - Jagjit Singh
For the public prosecutor - Hamid Embong

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Also found at [1982] CLJ 368